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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-734

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S, INC.,

Petitioners

v.

EDGAR E. WHITWORTH, d/b/a DINKIE'S FOOD MART,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORPORATION, TOM RODEN, and PINKIE'S, INC., petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this action.

OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 559

F.2d 378. The opinion of the United States District Court for the Northern District of Texas (Appendix B) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1977 and this petition is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is Section One of the Sherman Act applicable to a city's otherwise valid exercise of its zoning authority?

2. Does a private plaintiff have standing under the antitrust laws to challenge a city's otherwise valid zoning ordinance when the business which was allegedly injured could not come into existence by reason of state law and the ordinance and when the location for which the business is sought was zoned residential before its purchase by plaintiff?

STATUTES INVOLVED

This case involves consideration of the following statutes (the texts of which are set forth in Appendix C): Section 1 of the Sherman Act, 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1; Section 4 of the Clayton Act, 38 STAT. 730 (1914), as amended, 15 U.S.C. § 15; Section 16 of the Clayton Act, 39 STAT. 737 (1914), as amended, 15 U.S.C. § 26; TEX. REV. CIV. STAT. ANN. art. 1011a; The Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Arts. 66-4(a), 666-24, 666-54, 667-10½ (1974).

STATEMENT OF THE CASE

This Petition arises from the district court's entry of summary judgment for the Petitioners, as Defendants below, in an action filed by the Respondent on September 18, 1975 in the United States District Court for the Northern District of Texas (Civil Action No. CA-1-75-44). The Respondent has alleged that the Petitioners, acting in violation of Section 1 of the Sherman Act, unlawfully prevented his entry into the retail alcoholic beverage business in Impact, Texas, and thereby injured him. The named Defendants are the City of Impact, its elected officials, retailers of alcoholic beverages, and two other corporations.

In 1961 the City of Impact, Texas enacted a comprehensive zoning ordinance, which divided Impact into districts zoned "R" (Residential) and districts zoned "C" (Commercial). This ordinance, which has never been amended or repealed, prevents the operation of any commercial enterprise, including a retail alcoholic beverage establishment, in a district zoned Residential. Some six years after the enactment of this ordinance, in 1967, the Respondent Whitworth purchased a lot in Impact which was and is located in a district zoned Residential. Acting on an alleged desire to enter the retail alcoholic beverage business on that lot, Respondent Whitworth, in 1975, submitted to the Secretary of the City of Impact, an "APPLICATION FOR A WINE AND BEER RETAILERS OFF-PREMISES PERMIT." This state-promulgated form requires as a prerequisite to the state's grant of a license to engage in the liquor business that, if the premises are located in an incorporated city, the City Secretary certify that the city's charter and ordinances

do not prevent the sale of the alcoholic beverages at the location to be licensed.[1]

In accordance with the city zoning ordinance and Texas law, the Secretary of the City of Impact refused to certify that the sale of alcoholic beverages was permitted on the property in question. Because the City Secretary could not certify his application consistently with state law, Respondent Whitworth could not obtain a state license to engage in the alcoholic beverage business on his residential lot, thereby allegedly suffering injury. Rather than seeking the repeal or amendment of the 1961 zoning ordinance and instead of seeking a zoning change or variance through appropriate local procedures, Mr. Whitworth filed this federal antitrust action alleging that the Petitioner-City and its officials entered into a contract, combination or conspiracy to restrict competition in the retail sale of alcoholic beverages and, in furtherance of that conspiracy, enacted the City's general zoning ordinance and refused to certify his wine and beer application. The Petitioners, who were not City officials, allegedly participated in this conspiracy "through their outright control of certain city council members."

In granting the Petitioners' motion for summary judgment, the district court found the local zoning ordinance to be in all respects valid and a proper exercise of the City's legislative power—thus removing the zoning ordinance from federal antitrust challenge. The Respondent did not challenge on appeal the trial court's determination that the ordinance was valid as a matter of state and federal law. The Court of Appeals conceded the validity

1. *See* Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Arts. 666-24, 666-54, 667-10½ (1974).

of the zoning ordinance as a matter of state law but reversed the summary judgment and held that since the enactment of the ordinance was itself alleged to be part of the conspiracy, the mere presence of the zoning ordinance did not insulate the Defendants from antitrust liability. Relying on *City of Lafayette, La. v. La. Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977), the Court of Appeals directed a factual inquiry as to whether the City's actions in zoning and in abiding by state liquor laws, were "comprehended within the powers granted to it by the Legislature."

REASONS FOR GRANTING THE WRIT

QUESTION ONE: Is Section One of the Sherman Act applicable to a city's otherwise valid exercise of its zoning authority?

(a) The Fifth Circuit's decision will forge a new and dangerous course in the role of federal courts in local legislative matters.

Currently pending before this Court in *City of Lafayette La. v. La. Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976) *cert. granted*, 430 U.S. 944 (1977), is the issue of the extent to which Section One of the Sherman Act applies to the activities of city governments. The instant case involves precisely the same issue. In relying principally on its decision in *City of Lafayette*, the Fifth Circuit would have the district court on remand of this case apply a more stringent test in determining the applicability of the antitrust laws when the governmental unit concerned is a city rather than the state itself.

Because a central premise of the Court of Appeals' decision is currently under review by this Court, the Petitioners respectfully urge that consideration of both their case as well as the *City of Lafayette* case will afford this Court a unique opportunity to delineate the proper application of federal antitrust laws to the legislative decisions of city governments. While herein urging those same considerations which prompted this Court to grant a writ of certiorari in the *City of Lafayette* case, the Petitioners additionally suggest that their case, because of the nature of the governmental decision involved, presents more compelling reasons for granting review and ultimately resolving the issues in this important area. Even if this Court should agree with the Fifth Circuit in *City of Lafayette* that subordinate state governments are not *ipso facto* outside the coverage of the antitrust laws, the decision of the Court of Appeals represents a drastic departure from the traditional and proper role of federal courts. This petition raises the issue of antitrust review by federal courts of regulatory functions of local and state governments—functions which are uniquely sovereign. The importance of this question to local governments cannot be overstated.

The challenged decisions of the City of Impact were within the clear-cut zoning authority granted to cities by the state. TEX. REV. CIV. STAT. ANN. art. 1011a provides:

> For the purpose of promoting health, safety, morals, and for the protection and preservation of . . . the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict . . . the location and use of buildings, structures, and land for trade, industry, residence, or other purpose . . .

In addition to this statutory authorization, the State of Texas *expressly* recognizes the right of an incorporated city to prohibit the sale of alcoholic beverages in zones designated as residential. Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Arts. 666-24, 667-10½ (1974). But it is not only local zoning decisions which regulate the sale of liquor: Texas law prohibits any person from engaging in the liquor business except upon the receipt of a state license and upon conditions imposed by the state. Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Art. 666-4(a) (1974). When a liquor permit is sought for a location in an incorporated city, one of these conditions is that the city secretary must certify "whether or not the sale of alcoholic beverages for which license or permit is sought is prohibited by charter, ordinance, or any amendment thereto." Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Art. 666-54 (1974). Therefore, the inability of the Respondent Whitworth to enter the retail liquor business results directly from the *bona fide* operation of *state law*.

In spite of this unquestioned statutory basis for the City's actions, the Fifth Circuit expressed doubt that the zoning ordinance was a "*bona fide* governmental decision" and "comprehended within the powers granted to it by the Legislature." The Court of Appeals would require a judicial inquiry into "whether there was a conspiracy" and an examination of the motives and intent which underlie the legislative enactment. By the mere allegation of an antitrust conspiracy, the Fifth Circuit would require federal courts to go behind the legislative decisions of governmental bodies in order to determine and weigh the factors which contributed to the enactment. The Petitioners suggest that such review is improper.

Because zoning by its nature has geographically anti-competitive effects, the Court of Appeals has opened the courthouse doors for a tedious review of the motives behind all zoning ordinances both at the time of their passage and whenever thereafter a disgruntled plaintiff may come upon the scene. In the instant case, such a review would occur before the city was even presented with the opportunity to consider an amendment to the zoning ordinance or a variance. The plaintiff should not be permitted to by-pass these local procedures by the filing of an antitrust action in federal court. *See Brawner Building, Inc. v. Shehyn,* 442 F.2d 847 (D.C. Cir. 1971).

The omnipresent threat of treble damage liability would seriously jeopardize the free exercise of sovereign functions, especially in small communities whose coffers are limited. Prior to the decision of the Fifth Circuit, a city government was charged with the awesome responsibility of acting in the public interest—a standard enforced through the election process. The legislative bodies of the city and state governments, not the courts, have traditionally weighed the myriad of competing interest involved in governmental decision-making. The Fifth Circuit's decision below grants potential veto power over city legislative enactments to those in the community whose perception of the public interest differs from the elected officials. In all other circuits judicial review of zoning matters is limited to a determination of whether the general purpose of the zoning scheme has a rational relation to the public health, safety and morals, and was enacted in a manner which was not arbitrary or capricious. Whether a zoning ordinance causes hardship to a particular segment of the community or benefits another is, and should be, irrelevant in federal court review. *See,*

e.g., McMahon v. City of Dubuque, Iowa, 255 F.2d 154 (8th Cir. 1958), *cert. denied* 358 U.S. 833 (1958). Even the Fifth Circuit as recently as 1974 recognized that zoning is a legislative function and "the *only* question which Federal courts may consider is whether the action of the zoning authority is arbitrary and capricious and having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt,* 491 F.2d 5 (5th Cir. 1974) *cert. denied,* 419 U.S. 837 (1974) [emphasis added].[2]

The district court reviewed the zoning ordinance under these standards and found it to be valid. The soundness of this conclusion by the district court was unchallenged on appeal and was assumed by the Fifth Circuit. The validity of the zoning ordinance having been established, federal court inquiry should cease. Rather than permitting the federal courts to become zoning appeals boards, the Petitioners urge this Court to address the issues raised in their petition and return zoning and liquor regulation to a legislative status in the Fifth Circuit.

(b) The Fifth Circuit's decision conflicts with the prior decisions of this Court by misapplying *Parker v. Brown* and its progeny.

In *Parker v. Brown,* 317 U.S. 341, 352 (1943), this Court held that the Sherman Act did not apply to a

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2. The *en banc* decision of the Fifth Circuit in *South Gwinnett Venture* specifically reversed the decision of the three-judge panel of that court which would have required the zoning body to state its reasons for its actions. Without distinguishing their decision in *South Gwinnett Venture,* the Fifth Circuit in this case has apparently created an exception where a federal statutory cause of action is alleged. The Petitioners submit that such a standard is improper and creates a serious confusion regarding the validity of the actions of city governments.

restraint of trade imposed "as an act of government," a doctrine which has been refined by this Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) and, most recently, in *Bates v. State Bar of Arizona*, ____U.S.____, 97 S.Ct. 157[illegible] (1977). Even if this Court concludes in the *City of Lafayette* case that city governments are to be treated differently than state itself for antitrust purposes, the Court of Appeals' decision in the instant case would remain in conflict with the prior decisions of this Court.

Certainly there exist some actions by city governments which are so central to their sovereignty, that the antitrust laws should be deemed inapplicable under any analysis of the *Parker* line of decisions. The Petitioners suggest that zoning is precisely such a unique sovereign function. Here the Court is faced with a challenge to the acts of the sovereign itself—an unquestioned act of the government rather than of a private party trying to characterize its acts as state action. And unlike cases where a governmental unit has endeavored to enter what, for antitrust purposes, is the private sector,[3] there can be no doubt that the valid exercise of a city's zoning power is purely governmental.

In reversing the district court's summary judgment for the Petitioners, the Fifth Circuit has interjected factual issues beyond the contemplation of this Court's opinions and ignored the undisputed factual and statutory context of this case. For example, in *Goldfarb*, which held that

3. *See Goldfarb v. Virginia State Bar, supra; Cantor v. Detroit Edison Co., supra; Kurek v. Pleasure Driveway and Park District of Peoria, Illinois*, 557 F.2d 580 (7th Cir., 1977).

Parker did not prevent the application of Section 1 of the Sherman Act to the enforcement of a minimum fee schedule by the State Bar Association, this Court recognized that the State Bar was a governmental unit only for limited purposes and, absent enforcement of the State Bar's ethical opinions by the Virginia Supreme Court, there could not be "state action." In contrast to the nature of the actions of the State Bar in *Goldfarb*, the enactment of the City of Impact's general zoning ordinance and the refusal of the City Secretary to falsely certify the Respondent's application for a liquor license flowed directly from the statutes of the State of Texas.

Furthermore, the opinion of the Court of Appeals, while professing reliance on *Bates v. State Bar of Arizona*, directly conflicts with this Court's analysis in that decision. In finding no federal antitrust liability for the Arizona Supreme Court's adoption and enforcement of rules which prohibited advertising by attorneys, this Court distinguished *Goldfarb* and *Cantor* by recognizing the direct involvement of the State of Arizona as the "real party in interest." Moreover, this Court acknowledged that "the regulation of the activities of the Bar is at the core of the state's power to protect the public," ____U.S. at ____, 97 S.Ct. at 2697-98, and indicated that the result in *Cantor* would have been different had Detroit Edison Company been a governmental unit "respon[ding] to health or safety concerns" with a program "essential to regulation of electrical utilities." ____ U.S. at ____, 97 S.Ct. at 2697. Finally, this Court in *Bates* found no liability because "the state policy is so clearly and affirmatively expressed and . . . the state's supervision is so active." ____ U.S. at ____, 97 S.Ct. at 2698.

The enactment of the general zoning ordinance by the City of Impact and its concomitant enforcement through the state liquor laws are, like the activities of the Bar in *Bates*, "at the core of the State's power to protect the public" and a "response to health or safety concerns."[4] The Petitioners present this Court with the operation of two strong and clearly expressed areas of state concern—zoning and liquor regulation. Given the manner by which Texas has so clearly articulated its policies, this case falls squarely within this Court's decision in *Bates*.

To the extent that the Fifth Circuit has permitted possible antitrust liability to attach to a city's valid exercise of its uniquely sovereign functions, its decision conflicts with the decisions of this Court in *Parker, Goldfarb, Cantor* and *Bates*.

Additionally, the opinion of the Court of Appeals further conflicts with this Court's holdings in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) by requiring the court below to delve into the motives and political considerations which prompted the City of Impact's legislative enactment.

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4. Indeed, the promotion of health and safety is the express statutory basis for the granting of the power to zone to cities in Texas, TEX. REV. CIV. STAT. ANN. art. 1011a, and the traditional basis upon which zoning schemes have been upheld. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex. S.Ct. 1934).

QUESTION TWO: Does a private plaintiff have standing under the antitrust laws to challenge a city's otherwise valid zoning ordinance when the business which was allegedly injured could not come into existence by reason of state law and the ordinance and when the location for which the business is sought was zoned residential before its purchase by plaintiff?

(a) The Fifth Circuit's decision conflicts with the decision of other circuits by contravening important and well-established principles of standing.

In granting summary judgment for the Petitioners, the district court in part based its decision on doctrines of causation, injury and standing. That court recognized that Mr. Whitworth had acquired his lot six years after that lot had been zoned as residential by the City of Impact. Even if the Court of Appeals was correct in its *Parker* analysis, its decision is in direct conflict with the Court of Appeals for the District of Columbia in *Clouser v. David*, 309 F.2d 233, 234 (D.C. Cir. 1962) *cert. denied*, 372 U.S. 929 (1963). Under similar undisputed facts, the *Clouser* court held that summary judgment was appropriate for the Defendants when the "hardship, if any, has not resulted from the location, situation, or condition of the property, but solely from [the Plaintiff's] appropriation of it for commercial purposes without first having obtained the necessary change in zoning." Similarly, the Tenth Circuit in *C. F. Lytle Company v. Clark*, 491 F.2d 834 (10th Cir. 1974) refused to find that the zoning ordinances resulted in any "taking" where the Plaintiff's voluntary acts caused the hardship. By purchasing a residentially zoned lot, Respondent Whitworth's

protectable property interest never included, *ab initio,* a potential for commercial use.[5] Because nc protectable legal right of the Respondent Whitworth was affected by any act of the City of Impact or its officials, the Fifth Circuit, by allowing this case to continue, has broadened traditional concepts of standing to an unconscionable degree.

From a statutory perspective, the standing requirement of Section 4 of the Clayton Act, 15 U.S.C. § 15, that a private antitrust be "injured in his business or property" has been seriously eroded by the Fifth Circuit's decision. It is fundamental that the injury required to confer standing under Section 4 is a violation of a legal right. *Maltz v. Sax,* 134 F.2d 2 (7th Cir. 1943) *cert. denied,* 319 U.S. 772 (1943). When as here, a plaintiff does not have an operating business he has not suffered an injury to his "business or property" and has no cause of action unless he can further show that he had made substantial preparation to enter the business and was on the threshold of entry. *Martin v. Phillips Petroleum Co.,* 365 F.2d 629 (5th Cir. 1966). But even if Respondent Whitworth were to show a desire to enter the liquor business at his location in Impact and show some preparation to do so, it is certain that he could not, by operation of state law, establish that business, because so long as the valid zoning ordinance prevents the sale of liquor at that location he cannot obtain the necessary license from the state. Given this factual and legal impossibility under state law of

5. Texas courts have reached the same conclusion. In *Swain v. Board of Adjustment of City of University Park,* 433 S.W.2d 727 (Tex. Civ. App.—Dallas, 1968, writ ref'd n.r.e.) *cert. denied* 396 U.S. 277 (1969) the court held that "no vested rights were acquired by the use of the property contrary to the purpose of the ordinance."

establishing the business in question, the Respondent can have no protectable "business or property" within the meaning of Section 4.[6] *Okenfenokee Rural Electric Membership Corp. v. Florida Power & Light Co.,* 214 F.2d 413 (5th Cir. 1954); *Peller v. International Boxing Club,* 227 F.2d 593 (7th Cir. 1955); *American Bankers Club, Inc. v. American Express Co.,* 1977 Trade Cases § 61,247 (D. D.C. 1977). As with the plaintiff in *Okenfenokee,* Respondent Whitworth had "no legal right" without permission from the state. This important and well-established requirement of causation and a violation of a legal right has now apparently been abandoned by the Fifth Circuit.

In contrast to other courts which require the plaintiff to show that he would have been in the particular business "but for" the defendants' acts,[7] the Fifth Circuit has permitted Respondent Whitworth to maintain a cause of action when the alleged injury results entirely from the operation of state law. Petitioners respectfully urge that when the sole cause of injury is valid state action, it naturally follows that a plaintiff lacks standing under Section 4 of the Clayton Act to go behind that state action and maintain a claim against any private parties who happen to benefit from it.

6. The standing requirements of Section 16 of the Clayton Act, 15 U.S.C. § 26 have been similarly interpreted. *See, e.g., Credit Bureau Reports, Inc. v. Retail Credit Company,* 476 F.2d 989 (5th Cir. 1973); *Reibert v. Atlantic Richfield Company,* 471 F.2d 727 (10th Cir. 1973).

7. *See, e.g., Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 184 F.Supp. 440 (D. Pa. 1960), *aff'd* 297 F.2d 199 (3rd Cir. 1961) *cert. denied* 369 U.S. 839 (1962).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

EDGAR E. WHITWORTH,
d/b/a Dinkie's Food Mart, Plaintiff-Appellant,
v.
DALLAS PERKINS, et al.,
Defendants-Appellees.

NO. 76-1593.

United States Court of Appeals,

Fifth Circuit.

September 19, 1977.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This antitrust suit charges that defendants conspired to restrain competition in the sale of alcoholic beverages in Impact, Texas, by preventing plaintiff from making such sales on his property. The defendants are the town (a municipal corporation), six individuals (sued both individually and as aldermen of the town), and three private Texas corporations (including the corporation which developed this new town and those authorized to sell liquor in the town).

The district court entered summary judgment for the defendants. It concluded that the city's valid zoning ordinance, under which the operation of a liquor business on plaintiff's property is prohibited, bars recovery regardless of whether defendants' actions otherwise violate the antitrust laws. It reasoned that the "cause" of the plaintiff's injury would be the ordinance rather than any illegal conspiracy.

[1] The judgment is reversed. The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade. There are also significant questions concerning the availability of the "state action" exception to the antitrust laws which may have to be legally and factually developed and confronted on remand in the determination of this case.

Taylor County, Texas, and its largest city, Abilene, do not permit the sale of alcoholic beverages. In 1961 the individual defendant Dallas Perkins incorporated the town of Impact near Abilene under the relevant Texas statutes. Tex. Rev. Civ. Stat. Ann. art. 1133 (Vernon 1963). It had over the requisite 200 inhabitants but only 31 qualified voters. After litigation, Impact was held by the Texas courts to have been validly incorporated. *See Perkins v. State,* 367 S.W.2d 140 (Tex. 1963). Shortly thereafter, the new city authorized the sale of alcoholic beverages under the local option provisions of Texas law. Tex. Penal Code Ann. art. 666-32 (Vernon 1976 Auxiliary Pamphlet). Thus was created an "oasis" on the boundary of a "dry" city in a "dry" county. At approximately the same time the city council enacted a

comprehensive zoning ordinance. That ordinance prohibited the sale of alcoholic beverages on lots zoned residential.

In 1967 the plaintiff purchased a lot zoned residential. In 1975 he attempted to secure appropriate authorization to sell alcoholic beverages on that land. This was denied by the city because of the ordinance. He then commenced this action against the City of Impact, its mayor, secretary, and the three other aldermen of Impact, and various other private defendants engaged in or related to persons engaged in the sale of alcohol in Impact.

The district court determined that the zoning ordinance had been enacted in accordance with Texas law. That determination is accepted as being accurate for the consideration of this case.

The court then stated that it had no authority to inquire into the "motives or the integrity of the members of the municipal legislative body in the exercise of their legislative powers" and concluded that the plaintiff would "not be entitled to use his property in Impact for a place to sell alcoholic beverages regardless of what the defendants' conduct has been in regard to the alleged antitrust violations."

[2] Plaintiff clearly alleges that the defendants enacted the ordinance for the precise purpose of excluding him from the liquor business in furtherance of their conspiracy:

> At various times since the inception of the contract, combination or conspiracy, the Defendants have engaged in various overt acts in furtherance thereof, some of which are known to the Plaintiff . . . .

> Specifically, the Defendants, . . . in their capacity as Aldermen of the City of Impact, have at various times purportedly enacted various ordinances regulating the sale of alcoholic beverages within said City and restricting such sales to certain areas. These ordinances include . . . an ordinance dated December 29, 1961, entitled "Zoning Ordinance for the City of Impact, Texas," . . . .

If the plaintiff can prove this allegation and that he was harmed by the zoning ordinance, questions remain as to whether the ordinance was passed as part of an illegal conspiracy, and whether any acts violative of the antitrust laws are nonetheless immunized because the ordinance was the product of state action.

The starting point for the latter question is *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In that case an injunction was sought against a state agricultural marketing program for raisins. The program had been created by state statute and reduced the amount of competition in the market for raisins. The Supreme Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351, 63 S.Ct. at 313. In the three decades since that opinion the contours of this exclusion have been constantly redefined.

It is readily apparent that there are many factual differences between the scheme left undisturbed in *Parker* and the one here at issue. *Parker* involved the conduct of a state, while we are concerned with a city, acting under state law. *Parker* involved a program allegedly enacted

for the public good, while here the allegation is that the program was enacted to further private financial objectives. Finally, in *Parker* the questioned state program had been adopted "with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture." There is no such federal, or even state conduct suggesting tacit approval in the present case. In fact, this case appears to fall precisely within a category that the *Parker* Court specifically refrained from dealing with. As the Supreme Court put it, that case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade". 317 U.S. at 351-352, 63 S.Ct. at 314. That is the question here.

[3] In resolving this type of question this Court has recognized that the *Parker* doctrine is not to be applied automatically. A thoughtful analysis is called for to ensure that it is a *bona fide* governmental decision for which exemption is being sought.

> [I]t is not every governmental act that points a path to an antitrust shelter. We reject "the facile conclusion that action by any public official automatically confers exemption." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders Inc.*, 1 Cir. 1970, 424 F.2d 25, 30. In *Asheville Tobacco Board of Trade, Inc. v. FTC*, 4 Cir. 1959, 263 F.2d 502, 509, the court stated: ". . such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful."

Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). This Court's focus on the nature of the decision made by the governmental unit which claims the protection of *Parker* was reflected in *Jeffrey v. Southwestern Bell,* 518 F.2d 1129, 1134 (5th Cir. 1975), where the activity was scrutinized to be sure that it was not "perfunctory" or "slipshod." *See also Gas Light Co. of Columbus v. Georgia Power Co.,* 440 F.2d 1135 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062, 92 S.Ct. 732, 30 L.Ed.2d 750 (1972).

If, on remand, the district court reaches the state action exemption inquiry, it will need to take careful note of two recent Supreme Court opinions which clarify the scope of that doctrine. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), concerned a regulated utility which provided free light bulbs to consumers. It could not discontinue this practice unless it filed a new tariff with the state public service commission. The cessation of the light bulb program without governmental approval would constitute a violation of state law. The Court nonetheless held that the state action defense was not available. *Bates v. State Bar of Arizona,* ____U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d____ (1977), addressed an attack on State Supreme Court rules prohibiting lawyers from advertising. The Court there ruled that because the allegedly anticompetitive practice had been adopted by the affirmative act of the state and reflected its policies, the state action defense was available. Whether *Parker* might shield the defendants in the instant case can only be determined by careful consideration of these latest pronouncements.

[4] Finally, we note that where the governmental unit concerned is other than a state itself, such as the municipality here, a more thorough analysis is required before *Parker* can be held to apply.

> A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. . . . the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.

City of Lafayette, La. v. La. Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *cert. granted,* ____U.S. ____, 97 S.Ct. 1577, 51 L.Ed.2d 791 (U.S. 1977). Based on the pleadings in this case and this line of authority interpreting *Parker,* we are unable to say at this early stage that the plaintiff could prove no set of facts which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Hepperle v. Johnston,* 544 F.2d 201 (5th Cir. 1976).

In the oral argument of this case, numerous factual representations were made in defense of the district court's decision which have no support in the record now before us. Matters such as the number of acres in Impact which are zoned for commercial use, who owns such land, the relationship of these zones to each other, and the past

and present status of the parcel of land owned by the plaintiff are all issues which do not appear in the documents used to come to a summary disposition. In order to properly develop these, and other facts, and to conduct the inquiry into the *Parker* question, if such an inquiry proves necessary, the case must be remanded. Our decision does not in the least forecast the probable outcome of this litigation. Whether there was a conspiracy, or whether any conspiracy restrained trade or competition, or whether the zoning provisions "fall within the limited state action immunity doctrine [are] question[s] that we do not reach; it is for the trial court, in the first instance, to make this determination." *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 423 (5th Cir. 1976).

REVERSED AND REMANDED.

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CA 1-75-44

EDGAR E. WHITWORTH, D/B/A
DINKIE'S FOOD MART

v.

DALLAS PERKINS, NANCY PERKINS, His Wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORPORATION, TOM RODEN, PINKIE'S, INC., CITY OF IMPACT and HFW CORPORATION

(Filed January 30, 1976)

MEMORANDUM OPINION ON MOTIONS
FOR SUMMARY JUDGMENT

This suit, brought under Section 1 of the Sherman Anti-Trust Act (15 U.S.C. #1), charges that the defendants have engaged in various acts amounting to a contract, combination or conspiracy in restraint of trade or commerce among the several states. The plaintiff claims that such alleged conduct has prevented him from selling

alcoholic beverages on a lot in Impact owned by him. He seeks declaratory and injunctive relief, treble damages, attorneys' fees and court costs on account of the alleged anti-trust violations. He also alleges that certain acts of the defendant are in violation of Texas law, and prays for declaratory and injunctive relief in relation thereto.

The defendants are:

1. The town of Impact, Texas, a municipal corporation.

2. Dallas Perkins and his wife, Nancy Perkins, R. L. Perkins, Dickie W. Maxwell and Marion Teel, each of whom is sued both individually and in his official capacity as Aldermen of the City of Impact.

3. Impact Development Corp., Pinkie's Inc., and HFW Corp., each of which is a private corporation chartered under the laws of Texas.

The theory of plaintiff's case is that the town of Impact was chartered, and has been manipulated, by the other defendants for the purpose of enabling such defendants to have a monopoly on the sale of alcoholic beverages on a small "oasis" in the middle of a vast expanse of "dry" territory.

The case is now before the Court on motions filed by the defendants for dismissal or, in the alternative, for summary judgment.[1] Briefs have been filed and a hearing has been held on the motions. One of the grounds relied

1. Three of such motions are filed. One is by the town of Impact, Dallas Perkins, Nancy Perkins, R. L. Perkins, Dickie Maxwell and Marion Teel. Another motion is by the defendants, Tom Roden and Pinkie's, Inc. A third motion is by Impact Development Corporation. The first motion sets out the grounds relied upon, and the other motions adopt such grounds by reference.

upon by the movants is that a zoning ordinance of the town of Impact, adopted about six years before plaintiff acquired his lot, limits the use of the area which includes plaintiff's property to residential purposes only; and that the plaintiff would therefore not be entitled to use his property in Impact for a place to sell alcoholic beverages regardless of what the defendants' conduct has been in regard to the alleged anti-trust violations. The Court is of the opinion that this point is well taken, and that consideration of the other grounds is unnecessary. The case will be disposed of by summary judgment.

A review of the background of the town of Impact and the liquor business there will be helpful to an understanding of the claims here presented. That review is based on admissions of the parties, affidavits and documents on file herein, and the facts of which the Court may take judicial notice.[2] Some of these facts are mentioned in the opinions of the Supreme Court of Texas involving challenges of the legality of the incorporation of Impact. Perkins v. Ingalsbee, 347 S.W.2d 926 (1961), and Perkins v. State, 367 S.W.2d 140 (1963).

Impact is in Taylor County, Texas. Abilene is the county seat of Taylor County and the hub city of the area of Texas generally known as the "Big Country". The 1960 census showed that Abilene had a population of 90,368. Three large church supported schools of higher learning have been located in the city for many years.[3]

2. The matters judicially noticed are geographical and historical facts of common knowledge and census figures. 600 California Corp. v. Harjean, N.D. Tex., 284 F. Supp. 843 (1968), and cases therein cited.

3. Abilene Christian College is supported by the Church of Christ; Hardin Simmons University, by the Baptist Church, and McMurray College, by the Methodist Church.

At the time of the incorporation of Impact in 1961, Abilene and all of Taylor County and most of the voting units in the surrounding counties did not allow the sale of alcoholic beverages. Dallas Perkins, one of the defendants herein, undertook to provide an alcoholic beverage oasis through the incorporation of Impact and a subsequent election therein under the Texas Liquor Control Act.[4]

The local option system governs the sale of alcoholic beverages in Texas. Art. 16, Sec. 20, Constitution of Texas; Art. 666-32, Vernon's Ann. Texas Penal Code.[5] Upon the filing with the proper county clerk of a petition meeting the statutory requisites and containing the actual signatures of at least 35% of the qualified voters of a county, justice precinct or incorporated city or town, an election is required to be called to determine whether to make legal the sale of alcoholic beverages of one or more of the various types and alcoholic contents in the voting unit involved.

There was in 1960 a sparsely settled, unincorporated area of slightly more than 600 acres, with 85 qualified voters, known as North Park, adjoining the northwest boundaries of Abilene. Perkins selected 47.13 acres out

4. The local option provisions of the Texas Liquor Control Act permit authorization of the sale of alcoholic beverages in a municipal corporation in a dry county. Myers v. Martinez, Tex. Civ. App., 320 S.W.2d 862, writ refused, n.r.e., 326 S.W.2d 171.

5. Chapter 8, Title 11 of the Texas Liquor Control Act, was originally codified as Articles 666 (intoxicating liquors) and 667 (malt liquors), Vernon's Ann. Texas Penal Code, and that was the citation for it at the time of the incorporation of Impact and the liquor election therein. The new Texas Penal Code, adopted in 1973, neither repealed nor incorporated the above provisions of the Act. They are still in force, and are found in the Penal Auxiliary Laws Pamphlet pending enactment of the Alcoholic Beverages Code.

of that area to incorporate as the town of Impact.[6] Art. 1133, Vernon's Ann. Texas Civil Statutes, permitted the incorporation of a town having more than 200 inhabitants. The area proposed to be incorporated as Impact had slightly more than 200 inhabitants, 31 of whom were qualified to vote. The vote in the election on the issue of incorporation was 27 "for" and none "against". The town of Impact was declared to be incorporated on August 2, 1961. The municipal officials were elected by write-in votes on August 14, 1961. Shortly thereafter, a local option election was held, and the voters of Impact legalized the sale of all types of alcoholic beverages for off-premises consumption.

The land in the Impact area was a marsh until recent years, and the improvements on it are few and inexpensive. There were no commercial or public buildings, churches or schools there at the time of its incorporation. There has been little growth or development since the incorporation. Four of the five commercial buildings there now are used in connection with the liquor and beer businesses which plaintiff alleges are owned and operated by some of the defendants. The other commercial building is used solely for a grocery store. There are still no public buildings, churches or schools in Impact.

On October 4, 1967, the plaintiff purchased from Jimmie M. Lorenz the lot in Impact on which he now says he wants to operate a liquor business. On December

6. Perkins was severely criticized by his opponents in the state court litigation involving the incorporation of Impact for lifting only a small parcel out of the larger area of North Park. It was not unusual to expect a person with his plans to use only land that he owned or could control, as local option elections could be held frequently.

29, 1961, the town of Impact enacted a comprehensive zoning ordinance which is still in effect. That ordinance restricts to residential use the area embracing the lot in question. There is no claim that there has ever been any commercial use of any of that property. The plaintiff concedes that the zoning ordinance prohibits the use of his lot for the operation of a liquor business or for any other commercial use. He says, however, that the zoning ordinance is invalid for each of the following reasons.

1. It constitutes a deprivation of due process and a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the federal constitution.

2. It was enacted for the purpose of preventing competition which was not within the contemplation of the state statutes authorizing municipalities to enact such ordinances.

3. It was enacted by a city council "comprised in significant part of persons having such a direct or indirect conflict of interest as to render ordinances passed by them relating to the regulation of the sale of alcoholic beverages null and void."

The validity of zoning ordinances enacted pursuant to statutory authority has long been recognized by the Supreme Court of the United States and the Supreme Court of Texas. Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Lombardo v. City of Dallas, Tex. S.Ct., 73 S.W.2d 475 (1934). Such ordinances are not unconstitutional merely because they result in loss to owners of property by restricting its use. Lombardo v. City of Dallas, supra, at p. 478. They

do not constitute a taking of property under the right of eminent domain requiring compensation. Ellis v. City of West University Place, Tex. S.Ct., 175 S.W.2d 396, 398 (1943). It is not necessary to go into detail in describing the ordinance here involved. It is on file with the papers in this case. There is no claim of spot zoning or of retroactivity. The ordinance is comprehensive in nature and within the scope of the Texas zoning statutes. (Art. 1011a, b, Vernon's Ann. Tex. Civ. Statutes). There is no claim that there was a business operation on the property in question at the time of the passage of the ordinance. There is no basis for the claim that the ordinance was unconstitutional on the grounds set out in the first contention. Central Bank & Trust Co. v. City of Miami Beach, 5 Cir., 392 F.2d 549 (1968); Blackman v. City of Big Sandy, 5 Cir., 507 F.2d 935 (1975).

The second and third grounds—the motives of the councilmen and their conflict of interest—will be disposed of together.

Plaintiff says that the City Council which passed the zoning ordinance was composed of Dallas Perkins, the owner of an interest in the liquor stores in Impact, his wife, Nancy Perkins, his father, R. L. Perkins, and two employees of the liquor stores owned by some of the defendants. He argues that their connection with or relation to such liquor stores created such a conflict of interest in regard to the zoning of Impact that the zoning ordinance voted for by them was invalid.

The passage by a municipal corporation of a zoning ordinance represents the exercise of its legislative powers. City of Bellaire v. Lamkin, Tex. S.Ct., 317 S.W.2d 43 (1958). The courts have no authority to inquire into

the motives or the integrity of the members of the municipal legislative body in the exercise of their legislative powers. Soon Hing v. Crowley, 113 U.S. 703, 710, 5 S.Ct. 730, 28 L.Ed. 1145 (1884); Auto Transit Co. v. City of Fort Worth, Tex. Civ. App., 182 S.W. 685 (1916), writ refused; City of San Antonio v. Fetzer, Tex. Civ. App., 241 S.W. 1034 (1922), writ refused; City of San Antonio v. Walters, Tex. Civ. App., 253 S.W. 544 (1923), writ refused; Community Natural Gas Co. v. Southern Texas Utilities Co., Tex. Civ. App., 13 S.W.2d 184 (1929), writ dis.; Burford v. City of Austin, Tex. Civ. App., 379 S.W.2d 671 (1964), writ refused, n.r.e.; 2 McQuillin on Municipal Corporations, Sec. 739.

City of San Antonio v. Fetzer, supra, quoted the following from McQuillin on Municipal Ordinances, Sec. 257:

> "Neither the motives of the members, nor the influences under which they acted, can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers."
>
> "A court has no right to sit in judgment upon the motive or intent of such bodies in the performance of a purely legislative act whereof they have undoubted jurisdiction. *That right belongs exclusively to the voters to whom the legislative body is responsible.*" City of San Antonio v. Fetzer, supra.

The following is quoted from the opinion in City of San Antonio v. Walters, supra:

> "In considering the questions involved in this appeal, we remove from the discussion all inquiry into the good faith or motives of the commission government of the City of San Antonio. That is a matter not subject to judicial inquiry."

In oral arguments on the motions, plaintiff's counsel stated that he had been unable to find a Texas case holding an ordinance of general application invalid because it affected the interest of one or more of the members of the municipal legislative body who voted for its passage. The cases which he claims are most nearly in point are Moody v. City of University Park, Tex. Civ. App., 278 S.W.2d 912 (1955), writ refused, n.r.e.; and Hager v. State ex rel Te Vault, Tex. Civ. App., 446 S.W.2d 43 (1969), writ refused, n.r.e. Neither one of those cases is in point.

In the Hager case, it was held that a member of a city council whose recall was demanded was disqualified to vote on the resolution which authorized notice of appeal from judgment in mandamus action requiring city council to call an election for such recall. That case is distinguishable on the ground that the subject matter voted upon directly and immediately affected the councilman in question individually, instead of being one of general application.

The Moody case involved members of the City Board of Adjustment. The powers in question were quasi-judicial, not legislative. The members of the Board were also appointed, rather than elected.

It would be impossible for a legislative body to function if its members were required to operate under the conflict of interest standard applied to judges, as plaintiff here contends they should be. How many members of Congress, state legislatures or city councils would be left to vote on a general tax bill, if all those affected by the taxes were disqualified? Successful business men are constantly urged to serve on city councils. They are af-

fected by many of the ordinances of general application. It is apparently necessary to make the test whether or not the proposed legislation directly and immediately affects the legislator individually.[7]

The Court is of the opinion that the zoning ordinance bars recovery by the plaintiff as a matter of law, and that summary judgment should be rendered in favor of the defendants.

Signed, January 29, 1976.

/s/ LEO BREWSTER
Judge

7. Nothing herein shall be taken to mean that the Court personally endorses the conduct of the members of the City Council, if it was as claimed by the plaintiff. The cases apparently hold that more harm would be done by allowing inquiry into the motives of legislators voting on matters of general application, than by not doing so.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

C.A. NO. 1-75-44

EDGAR E. WHITWORTH, D/B/A
DINKIE'S FOOD MART

v.

DALLAS PERKINS, NANCY PERKINS, His Wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORPORATION, TOM RODEN, PINKIE'S, INC., CITY OF IMPACT and HFW CORPORATION

* * *

SUMMARY JUDGMENT

The motions for summary judgment filed by the defendants herein have been duly presented and argued in a hearing held after proper notice, with the respective attorneys of record for the various parties hereto present and participating; and the Court has reached the conclusion that such motions should be granted for the reasons set out in its memorandum opinion filed in connection herewith.

It is accordingly decreed that the plaintiff, Edgar E. Whitworth, take nothing as against any of the defendants herein, and that the court costs of this suit be taxed against him.

Signed, January 29, 1976.

/s/ LEO BREWSTER
Judge

APPENDIX "C"

APPLICABLE STATUTES
(in pertinent part)

Section One, Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . .

Section Four, Clayton Act, 15 U.S.C. § 15:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

Section Sixteen, Clayton Act, 15 U.S.C. § 26:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

Tex. Rev. Civ. Stat. Ann. art. 10112:

> For the purpose of promoting health, safety, morals, and for the protection and preservation of . . . the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict . . . the location and use of buildings, structures, and land for trade, industry, residence, or other purpose. . . .

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 666-4:

> . . . (a) It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from the state, transport, distribute, warehouse, store, solicit orders for, take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such privilege. . . .

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 666-24:

> In any city where the sale of liquor as herein defined is prohibited by its charter from being sold in its residence section, or any part thereof, such charter amendment shall remain valid and continue effective until such time as said charter provision may be repealed or amended as provided by law.

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 666-54:

> . . . The city secretary or clerk of the city in which an application for a license or permit is made shall certify whether or not the location or address is in a wet area and whether or not the sale of alcoholic beverages for which license or permit is sought is prohibited by charter, ordinance or any amendment thereto.

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 667-10½:

> In any incorporated city or town where the sale of beer as defined in the Texas Liquor Control Act is prohibited by charter or amendment thereto or

by any ordinance from being sold in the residential section, such charter amendments or ordinances shall remain valid and continue effective until such time as such charter provisions, amendments, or ordinances may be repealed or amended.

All incorporated cities and towns are hereby authorized to regulate the sale of beer within the corporate limits of such cities and towns by charter amendment or ordinance, and . . . designate certain zones in the residential section or sections of said cities and towns where . . . such sales may be prohibited. . . .

NOTE: In 1977, after the filing of the instant case, the Texas Legislature repealed the entire Texas Liquor Control Act and substituted therefor the ALCOHOLIC BEVERAGE CODE, which made no substantive change in the above sections.